

Danquah (Migration) [2023] AATA 1378 (11 May 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Thomas Kwame Danquah
VISA APPLICANTS:	Mrs Mercuria Aku Danso Mr Randison Kofi Mante
REPRESENTATIVE:	Dr Mohammad Al-Nakeeb (MARN: 0325153)
CASE NUMBER:	2215208
DIBP REFERENCE(S):	BCC2019/2753545
MEMBER:	Moira Brophy
DATE:	11 May 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • CI 309.211 of Schedule 2 to the Regulations; and • CI 309.221 of Schedule 2 to the Regulations • with an additional direction that the secondary visa applicant meets the following: • CI 309.321 of Schedule 2 to the Regulations.

Statement made on 11 May 2023 at 2:43pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – rapid inception of the relationship – consistent with

cultural beliefs – money transfers – care of the review applicant's son – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 309.211, 309.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 5 October 2022 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s 65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 28 May 2019 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 309.211 because the delegate was not satisfied on the evidence before it that the visa applicant was the spouse of the sponsor as defined and was not able to meet the requirements of the regulations.
4. The review applicant, Mr Thomas Kwame Danquah appeared before the Tribunal on 9 May 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant Mrs Mercuria Aku Danso.
5. The review applicant was represented in relation to the review. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

Background

7. The visa applicant is a 32-year-old female who resides in Ghana. She has declared no previous relationships. The visa applicant's parents, her two brothers and two sisters are residing in Ghana.
8. The review applicant is a 62-year-old male living in Sydney. The review applicant arrived in Australia on 9 December 2009 on a Subclass 309 (Partner (Provisional)) visa sponsored by his then partner. He is now an Australian citizen. He was married to Ms Cecilia Akwaboah in the period from 22 October 2002 to 23 May 2015. He was previously in a de facto relationship with Ms Rose Mante Affutu Oyie for a period from 5 January 2007 up to when she deceased on 5 October 2017. There is a son of the relationship who is named as a secondary applicant in this application. The review applicant's parents and two brothers are deceased; he has one brother and two sisters in Ghana and one brother in the United States.
9. At the time of the application, the parties stated they met on 20 February 2016 at Santrokofi, Accra. The parties committed to a long-term relationship to the exclusion of all others on 25 October 2017. They married at the Principal Registrar of Marriages Office in Accra, Ghana and their marriage was registered on 14 September 2018.
10. The delegate who made the original decision on 5 October 2022 noted the following issues:

- The delegate was not satisfied the evidence as to the financial commitment of the parties gave strong support to the contention the parties were in a genuine and continuing relationship, but given they were living in different countries he placed limited weight on that factor.
- The delegate gave limited weight to the evidence the parties shared a joint household as he found that while that was their intention, they had not lived together at the time of application.
- While acknowledging there was some evidence of the social aspects of the relationship (wedding photographs, evidence of shared time with family and friends, Form 888s from the father of the visa applicant), the delegate was not satisfied the visa applicant and review applicant presented to family and friends generally as being in a genuine and continuing spousal relationship.
- The delegate found the parties provided limited evidence of their communication with each other and given the limited time the parties had spent together he was not satisfied the nature of their commitment was consistent with their claim of being in a committed relationship.

Tribunal proceedings

11. The issue in the present case is whether the visa applicant and the review applicant were in a genuine spousal relationship at the time of application and continue to be in a genuine spousal relationship at the time of this decision.
12. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the review applicant and the visa applicant at the hearing.
13. The parties generally gave consistent evidence about how they met, and of their time together since they married, of the circumstances of their families and of their working lives. Given the evidence as to when the review applicant had previously married, when he came to Australia, and when his son had been born, the Tribunal discussed with the review applicant the history of his past relationships and the impact of that timeline on his present application, given he had committed to a relationship with the visa applicant very shortly after the death of his defacto partner who was the mother of his son. The Tribunal discussed with the parties its concerns as to the rapid inception of this relationship. While this was obviously distressing for the review applicant, and he was a poor historian especially in his recall of relevant dates, his evidence as to his commitment to his present relationship was consistent. The review applicant explained that while he had married his first wife in 2002, he had not in fact come to Australia as her partner until 9 December 2009. The review applicant explained that application had been delayed, and during this period he had entered a de facto relationship with Rose Mante Affutu Oyie. His son was born on 2 November 2007. While he came to Australia he maintained a relationship with the mother of his son and his son, and they lived in a home owned by the review applicant. He said that had caused problems in his relationship with his wife in Australia and they had ultimately divorced.
14. The review applicant told the Tribunal he had discussed with Rose Mante Affutu Oyie how he would care for their son after she died given he lived in Australia and his son was in Ghana. It was her suggestion that he needed to marry to have a mother for their son. Soon after her death he approached the Tribal elder in their village and spoke to him of his intention to marry his daughter (the visa applicant). The Tribal elder agreed and the visa applicant moved into the home of the review applicant to care for his son. As per their custom, they married twelve months after Rose Mante Affutu Oyie died. Their wedding was attended by

both families. The Tribunal found this to be persuasive evidence the union was consistent with their cultural beliefs and accepted by their families as being in the best interests of both parties to the union.

15. The initial concerns of the Tribunal were assuaged by the consistency of the evidence the parties gave.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are in a spouse or de facto relationship

16. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australia citizen.
17. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant and review applicant's household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

18. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 14 September 2018 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects of the relationship

19. The review applicant lives alone in Sydney in a rented unit. He has lived there for eight years. He pays \$380 rent per week. He is employed as a taxi driver. He works five days or six days a week and generally earns around \$650 per week after expenses.
20. The visa applicant lives in Ghana with the son of the review applicant in a property owned by the review applicant. The siblings of the review applicant's son previously lived at the property, but they now live elsewhere. The visa applicant is currently not employed as she cares for the review applicant's son.
21. The review applicant has consistently sent money to the visa applicant for her personal use and the needs of his son.

22. They do not share day-to-day household expenses, and each maintains their own bank accounts for day-to-day expenses. This is not unusual given the review applicant is in Australia and the visa applicant is in Ghana.
23. The Tribunal places some weight on this aspect of the relationship as it is indicative of parties in a genuine and continuing relationship pooling their available resources despite living in different countries.

24. *Nature of the household*

25. The Tribunal accepts that since the parties married in 2018, the review applicant has stayed with the visa applicant for around four months. The Tribunal accepts the parties stayed together as a couple during the periods the review applicant was in Ghana.
26. The parties gave consistent evidence as to the household arrangements during the periods they were together.
27. The parties gave consistent evidence about their plans to establish a joint household in Sydney and for the son of the review applicant to live with them and attend school.
28. The Tribunal places little weight on this aspect of the relationship given the limited periods of cohabitation since marriage.

29. *Social Aspects of the relationship*

30. The Tribunal accepts from the photographic evidence, the supporting documentation by way of Form 888s, and their oral testimony at hearing, that the parties have as a couple spent time with their family and friends in Ghana and they were seen within their community there as a married couple.
31. The Tribunal accepts on the evidence before it the parties present to their family and friends as a married couple.

Nature of the persons' commitment to each other

32. Given the concerns raised by the delegate, the Tribunal carefully considered the evidence as to the nature of the commitment of both parties to the relationship. The Tribunal accepts the parties have known each other since 2016, having met through extended family.
33. As referred to above, the Tribunal had some concerns as to the nature of the relationship, specifically the limited time the parties had spent together, and the relatively rapid inception of the relationship given the limited time they had spent together. The review applicant was a poor historian and was limited in the assistance he gave the Tribunal in resolving its concerns. The visa applicant was forthright in her evidence, she had a good understanding of the review applicant's circumstances, and the Tribunal was persuaded that she was committed to the review applicant and to being with him. She was forthright in her evidence as to their attempts to conceive a child, their IVF attempts and the potential impacts of the review applicant's health problems on their relationship.
34. Based on all the evidence, the Tribunal finds the parties have a commitment to each other consistent with them being in a spousal relationship. The Tribunal found their evidence of their concern at their continued separation, especially given the imposed limitation on travel due to the COVID-19 pandemic, to be genuine and persuasive.

35. Given the above findings, the Tribunal is satisfied that at the time the visa application was lodged and at the time of this decision, the parties are validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal finds that they intend to live together in Australia and that they therefore do not live separately and apart on a permanent basis.
36. Accordingly, the Tribunal finds that the visa applicant satisfies the definition of 'spouse' in s 5F(2)(a)-(d), and that the parties are in a spousal relationship.
37. The review applicant is an Australian citizen.
38. Given these findings, the Tribunal is satisfied that at the time the visa application was made, and at the time of this decision, the parties were and are in a spousal relationship. The Tribunal finds that the visa applicant is the spouse of the review applicant and satisfies cl 309.211(2) and therefore cl 309.211. The Tribunal finds that at the time of decision, the visa applicant continues to satisfy cl 309.211.
39. Therefore, the visa applicant satisfies both cl 309.211 and cl 309.221.

Secondary visa applicants

40. The Tribunal is satisfied on the basis of the application forms that the sponsorship referred to in cl 309.321 in respect of the person who satisfies the primary criteria includes sponsorship of the second named visa applicant, Randison Kofi Mante. Accordingly, the Tribunal finds that the second named visa applicant meets cl 309.312.
41. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

42. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- CI 309.211 of Schedule 2 to the Regulations; and
- CI 309.221 of Schedule 2 to the Regulations

with an additional direction that the secondary visa applicant meets the following:

- CI 309.321 of Schedule 2 to the Regulations.

Moir Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).